

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SEAN WHITE,

Defendant-Appellant.

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UNPUBLISHED

September 23, 2004

No. 247608

Wayne Circuit Court

LC No. 02-006105-01

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals by right his convictions, after jury trial, of assault with intent to murder, MCL 750.83, armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to twenty to thirty-five years in prison for the assault with intent to murder conviction, twenty to thirty-five years in prison for the armed robbery conviction, 2½ to 5 years in prison for the felon in possession of a firearm conviction, five to twenty years for the first-degree home invasion conviction, and two years in prison for the felony-firearm conviction. We affirm.

Defendant first contends that he was entitled to the assistance of counsel during a pre-custody photographic identification procedure. We disagree. Because defendant does not allege a violation of due process because the photographic lineup was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification, *United States v Wade*, 388 US 218; 87 S Ct 218; 18 L Ed 1149 (1967), his argument is without merit.

“‘In the case of photographic identifications, the right of counsel attaches with custody.’” *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001), quoting *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Indeed, the federal and Michigan constitutional right to counsel with respect to identification procedures, “attaches only . . . at or after the initiation of adversarial judicial criminal proceedings.” See *People v Hickman*, 470 Mich 602, 603, 609; 684 NW2d 267 (2004), addressing corporeal lineups, and overruling *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973) to the extent it extended the right to counsel to a time before initiation of adversarial criminal proceedings. Accordingly, defendant’s argument fails.

Defendant insists that trial counsel's failure to challenge the photographic lineup before trial constituted ineffective assistance of counsel. We disagree. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). This Court will not reverse a conviction on the basis of ineffective assistance of counsel unless the defendant establishes that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that but for counsel's error the result of the proceedings would have been different, and that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant's claim is without merit to the extent it is based on the lack of counsel at the pre-custody photographic lineup procedure. Trial counsel will not be deemed ineffective for failing to advocate a meritless position or failing to bring a fruitless motion. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). To the extent defendant's claim is based on counsel's failure to move to suppress the eyewitnesses' identification on other grounds, defendant has failed to prove the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant next contends that the trial court erred in denying his motion to quash the information because the prosecutor presented insufficient evidence at the preliminary examination of the requisite intent to commit the crime of assault with intent to murder. We disagree. Defendant's argument fails because appellate counsel does not argue that the prosecutor presented insufficient evidence at trial to sustain defendant's conviction. "If a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1011; 677 NW2d 29 (2004), citing *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990), and *People v Yost*, 468 Mich 122, 124; 659 NW2d 604 (2003). Although defendant, in a standard 11 brief, does argue that insufficient evidence supported his conviction, he does so on the basis of lack of physical evidence connecting him to the crime. But two eyewitnesses identified defendant as the perpetrator. Their credibility and the weight to be accorded their testimony was for the jury to determine. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Because sufficient evidence at trial supported defendant's convictions, defendant fails to state a cognizable claim on appeal regarding the preliminary examination. *Wilson, supra*.

We affirm.

/s/ E. Thomas Fitzgerald  
/s/ Janet T. Neff  
/s/ Jane E. Markey